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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

USA RECYCLING, INC., FRIENDLY CARTING, INC., JOSEPH CARIONE, ANGELO CARIONE, JEAN I. CARIONE, AND LOUIS CARIONE, and CARL R. FUCCI,

Petitioners,

-against-

THE TOWN OF BABYLON, THE TOWN BOARD OF THE TOWN OF BABYLON, RICHARD H. SCHAFFER, SUPERVISOR, FRANCINE V. BROWN, COUNCILWOMAN, PATRICK HAUGEN, COUNCILMAN, ROBERT KAUFOLD, COUNCILMAN, ANTHONY TAFURI, COUNCILMAN, AND BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

1. Review Must be Granted to Clarify When Regulatory Action "Discriminates Against Interstate Commerce"

Respondents seek to persuade this Court that the petition should be denied because the question presented, if answered

in the affirmative, would effectively declare "the municipal police power to take direct responsibility for garbage collection" to be at an end. Town of Babylon Brief in Opposition at 8. Because this is not the case, it is important at the outset to clearly state what Petitioners do *not* argue, so that the central issue before the Court will be clear.

Petitioners do *not* challenge the police power of the Town to regulate garbage collection and disposal to protect the health, safety, and welfare of its citizens.[1] Petitioners do *not* challenge the right of the Town to collect and dispose of garbage generated by municipal employees as it sees fit, or to hire a private entity such as BSSCI to collect and dispose of the garbage generated by the Town's employees as the Town directs. Petitioners do *not* challenge the right of the Town to offer garbage collection and disposal services to anyone who wishes to use those services, or to hire a private entity such as BSSCI to provide those services on behalf of the Town. Petitioners do *not* dispute that the State of New York has authorized the Town, with regard to collection and disposal of garbage, "to displace competition with regulation or monopoly public service." 1985 Laws of N.Y. ch. 478. Petitioners do *not* dispute that the two turn-of-the century decisions of this Court in *California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306 (1905) and *Gardner v. Michigan,* 199 U.S. 325 (1905) together hold that a municipality, pursuant to its police power, may provide exclusive garbage collection and disposal services.

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[1] We do not concede, however, that the Babylon scheme is anything other than a revenue raising measure. In the EPA's Report to Congress, "Flow Controls and Municipal Solid Waste," EPA 530-R-S95-008 (March 1995) at II-6, EPA found that: "Protection of human health and the environment is directly related to the implementation and enforcement of federal, State, and local environmental regulations. Regardless of whether State or local governments administer flow control programs, States are required to implement and enforce federally approved regulations that fully protect human health and the environment. Accordingly, *there are no empirical data showing that flow control provides more or less protection.*" (emphasis added).

Petitioners *do* disagree with the conclusion that the Town, consistent with the Commerce Clause and without Congressional authorization, may provide **exclusive** garbage services to businesses within the Town. Without Congressional authorization, the Town can offer garbage services; it may not force people to use them.[2]

The Second Circuit recognized that the Town achieved its monopoly within the District through the exercise of its regulatory powers, and so could not justify discrimination against interstate commerce by reliance upon the market participation doctrine. *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272, 1282-83 (2d Cir.1995). Nevertheless, the lower court found that the exercise of monopoly control over a market that previously was open to competition did not discriminate against interstate commerce.

The reasoning of the Second Circuit -- that no one enjoys a monopoly position selling garbage collection services in the District because the Town eliminated the market entirely and is providing services as a local government, "not as a business selling to a captive consumer base" -- is absurd. *Id.* at 1283. According to the lower court, the Town is not selling anything, but is taxing people for services provided, and thus cannot be said to favor a single, local proprietor as in *Carbone.*

Based on this reasoning, had the Town of Clarkstown created a commercial garbage district, passed a regulatory scheme making the Town exclusively responsible for garbage collection, and then contracted with all the private carters who previously collected garbage in the Town to provide collection service on

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[2] Respondents deem it significant that this Court denied the petition filed in *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2nd Cir. 1995), *cert. denied,* 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996). The petitioner there, however, was the successful bidder for collection services in seven of the Town's ten residential districts, not a carter who was deprived of the right to collect, or a resident who was forced to use the Town's services. The issues raised by the instant petition would not have been resolved by a grant of *certiorari* in the *SSC Corp.* case.

behalf of the Town which would be billed to generators by the Town on a user fee basis, and allowed these carters to discharge garbage at the Town's transfer station for free (while making the carters responsible for disposal fees if they go elsewhere), this Court would have decided *Carbone* differently. There is not the slightest suggestion in the majority opinion that this would be the case, for the "design and effect" of such a scheme would still be to "hoard solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Carbone*, 114 S.Ct. at 1683.

If a Circuit Court can conclude that a regulatory scheme that removes 96,000 tons per year of garbage from a once-open market for the benefit of the municipality that adopts that scheme does not discriminate against interstate commerce, then review by this Court to clarify the meaning of "discrimination" is badly needed.[3]

Discrimination must be determined based on the "practical design and effect" of the regulatory scheme on interstate commerce, *Carbone*, 114 S.Ct. at 1683, 1684. Respondents claim that, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), this Court "rejected the 'design and effect' approach by distinguishing and considering separately for purposes of applying the market participant doctrine, each activity in which the State was involved." Town of Babylon Brief in Opposition at 13.

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[3] Respondent BSSCI suggests that the garbage will still be available to the market because "it intends to contract with a processing facility or facilities to separate any recyclable waste collected." BSSCI Brief in Opposition at 7. This is farcical. Under BSSCI's contract, it may bring 96,000 tons of waste per year to the incinerator for free, but must pay to bring it elsewhere. If BSSCI contracts with another facility to bring the solid waste to that facility so that recyclable material can be removed, that facility will have to pay to dispose of the residue, and obviously will charge BSSCI a fee for processing the waste, and disposal of the residue. As stated by the District Court, "the Service Agreement" 'gave BSSCI not only a powerful, but virtually an irresistable incentive to dispose of the waste at the town facility.'" *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1280 (2d Cir. 1995)

This argument demonstrates the need for review by this Court, not only of the meaning of "discrimination" and the scope of the market participation doctrine, but to reaffirm when market participation analysis is appropriate. In *South Central Timber*, the Court found that the market participant doctrine did not apply where the State required that timber taken from state lands be processed within the state prior to export. The doctrine was found not to apply because actions taken by the State as a market participant had down stream effects on the timber processing market, which the State was not a participant in. Because the Town of Babylon participates in both the garbage collection and garbage disposal markets, the Town claims that the separate analysis of each market by the Second Circuit was appropriate.

The fatal flaw in the Second Circuit's analysis is that it ignored the significance of the means by which the Town obtained control over the waste in the first instance. The State of Alaska already owned the timber, and did not have to exercise its police powers in order to obtain the right to sell timber. Nor did the State of Alaska seek to compel people within the State to purchase lumber from the State. The exercise by Babylon of its regulatory powers in the first instance to obtain control over the garbage within the district, and to force the generators of that waste to use the Town's services, which the Town claims it is offering as a market participant, is what distinguishes this case from *South Central Timber*, and all of the market participant cases decided by this Court.[4]

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[4] Respondent BSSCI also failed to make this distinction. BSSCI argues that, because the Second Circuit ruled that the Town could properly form the garbage district, the Town was collecting and disposing of its own waste, and thus was no different than the municipalities in the market participant cases decided by this Court. Respondent BSSCI's Brief in Opposition at 5. This argument begs the question which is before the Court: Could the Town, through regulatory enactments, properly hoard solid waste for itself that previously was available to the interstate market. Moreover, the Town did not seek to make the waste its "own;" if it had, it would have paid for collection and disposal out of general taxes. The services provided by the Town here are paid for by imposing user fees on the private businesses that must use the Town's services.

It is indisputable that the Town obtained control over the solid waste through exercise of its regulatory powers, and the "design and effect" of doing so was to hoard the waste for the benefit of the local facility. Because this constitutes discrimination against interstate commerce under *Carbone*, there was no reason for the Second Circuit to have reached the market participation doctrine issue. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (market participation exception would not apply because the state land commission had "a complete monopoly over the sites" being leased; only "state's participation in the marketplace as a *competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem.*, 471 U.S. 81 (1985).

2. Review by this Court is Required to Affirm That the Mere Exercise of Police Power Alone Does Not Guarantee That An Action Will Not be Invalidated Under the Commerce Clause.

The Second Circuit, by relying extensively on *California Reduction* and *Gardner*, clearly agrees with the argument of the Town that, "where municipal police power is exercised in reasonable response to a traditionally local concern, the courts will not interfere." Town of Babylon Brief in Opposition at 6. The lower court repeatedly emphasized that it was not for it to overturn ninety years of precedents, even though those precedents did not discuss the Commerce Clause. Thus the court said that it was deciding the case "against the backdrop of two venerable, and until now unchallenged, decisions of the Supreme Court [*California Reduction Co.* and *Gardner*]." 66 F.3d at 1292-93. Continuing, the Second Circuit stated that it "cannot brush aside two Supreme Court precedents that dealt with waste disposal systems so similar to the one before us today. If we were to rule in plaintiffs' favor, the municipal garbage systems upheld by the Court in *California Reduction* and *Gardner* would be unconstitutional, and municipalities could no longer undertake the traditional local governmental function of collecting town garbage." *Id.* at 1294. Thus the Second Circuit "refuse[d] to undercut the longstanding precedents

of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents." *Id.*

Regardless how firmly entrenched a police power might seem to be, it is completely settled that it cannot be sustained if exercised in a way that discriminates against interstate commerce. A necessary predicate for Commerce Clause analysis is that the municipality act pursuant to its police powers -- without that finding, the Commerce Clause issue need not be reached. This Court has repeatedly made clear that a finding that a state or municipality has acted in accord with its police powers begins the Commerce Clause discussion, it does not end it. *See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon,* 114 S.Ct. 1345, 1354 (1994) ("if the State, under the guise of exerting its police powers, should [impose a burden]... applicable solely to articles [of commerce] ... produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States," *quoting, Guy v. Baltimore,* 100 U.S. 434, 443); *West Lynn Creamery, Inc. v. Healy,* 114 S.Ct. 2205, 2211-12 (1994) ("'Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents....").

3. Review By This Court is Required to Affirm That Congress, and Not The Courts, Must Determine When Discrimination Against Interstate Commerce Will Be Allowed.

The Town describes a parade of horribles that will arise if the Second Circuit's decision is not sustained. The concerns raised by respondents are not appropriate for the courts, however, for Congress has plenary power over the determination whether to permit a state or municipality to discriminate

against interstate commerce. Of the many cases cited by the Town that have upheld monopoly public service (Town of Babylon Brief in Opposition at 6 and n.6), all but two involved only antitrust claims, and the two that did discuss the Commerce Clause were decided before this Court's decision in *Carbone*.[5]

As discussed in detail by the New York State Conference of Mayors and Municipal Officials as *Amicus Curiae* in support of the petition filed in the companion case hereto, *A.A. & M. Carting Service, Inc. v. The Town of Babylon* (No. 95-1223), Congress thus far has refused to authorize flow control laws or their equivalent, even for facilities in operation before *Carbone* was decided, despite incessant lobbying by Towns such as Babylon in favor of such legislation. The Second Circuit's decision arose from a consideration of policy matters which should have been irrelevant to its determination. Review by this Court is required to clarify the proper role of the courts in matters relating to the Commerce Clause.

4. Review By This Court Is Required Because Petitioners are Disenfranchised Within the Town, and Their Only Remedy for Protection of Their Constitutional Rights Lies Within the Courts.

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[5] *Hass v. Oregon State Bar*, 883 F.2d 1453, 1462 (9th Cir. 1989); *Transport Limo. v. Port Auth. of New York*, 571 F.Supp. 576 (E.D. N.Y. 1983). In *Hass*, the court upheld against a Commerce Clause challenge a state-authorized requirement of the bar association that all members of the bar purchase malpractice insurance from the bar. The Court there made the same error in analysis that the Second Circuit did here -- it concluded that the statute did not discriminate against interstate commerce because it discriminates equally against in-state and out-of-state insurance companies because all are "effectively prevented from competing with the Bar to provide primary malpractice coverage." *Id.* The court did not have the benefit of this Court's decision in *Carbone*, where the Town's transfer station was the sole beneficiary of the regulatory scheme, yet discrimination against interestate commerce was found. In *Transport Limo.*, contrary to the Town's implied suggestion, the court did not uphold "an exclusive airport livery service" against a Commerce Clause claim. Town of Babylon's Brief in Opposition at 6. The issue under the Commerce Clause was not the validity of the exclusive bus service granted to Long Island Limousine, but whether an 8% tax on gross proceeds charged to every provider of limousine service using a desk and telephone at the airports provided

Because the Second Circuit has decided this case in a manner inconsistent with this Court's decision in *Carbone*, as well as decisions by the Third and Eleventh Circuit Courts of Appeal,[6] Petitioners' only remedy for relief is review by this Court.

The Town has an overwhelming financial interest in the garbage district which has nothing to do with its obligation to pay off bonds that were issued to finance the construction of the solid waste resource recovery facility. Simply put, garbage districts are "cash cows" that allow a municipality to raise revenue from the business community for general expenses with impunity. In Babylon, the actual cost to the Town for the right to dispose of solid waste at the incinerator is $78.00 per ton. The fees charged the businesses within the District are far in excess of what the Town needs, and are designed to raise money for other projects so that Town taxes on residents will not have to be raised. After the cost of collection by BSSCI is taken out, the $1,500.00 basic service fee calculates out to a disposal charge of approximately $272.00 per ton, and the $9.75 per cubic yard fee for each cubic yard above basic service calculates out to approximately $114.00 per ton for disposal.[7]

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by the Port Authority discriminated against interstate commerce. Because the tax was imposed on everyone equally, no discrimination was found. This decision is thus irrelevant to the instant case.

[6] *Atlantic Coast Demotion & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3rd 701 [3rd Cir. 1995], and *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Fupp. 1566 [M.D. Ala. 1993], *aff'd* 29 F.3rd 641 [11th Cir. 1994], decisions which the Second Circuit neither acknowledged nor discussed. In *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2nd Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (U.S. Feb. 20, 1996), however, the same panel acknowledged the conflict with the *Waste Recycling, Inc.* decision, but refused to adopt the reasoning of the Eleventh Circuit. *Id.* at 515-16. Remarkably, the Town of Babylon chose to ignore Petitioners' discussion of the *Atlantic Coast* case, and instead treated another Third Circuit case [Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 16, 1996)], helpful to the Town's position, as the case Petitioners asserted was inconsistent with the Second Circuit's decision! Town of Babylon Brief in Opposition at 9.

[7] This is hardly atypical. In the *Carbone* case, for example, the Town entered into a contract whereby a private party would construct a $1.4 million transfer sta-

The business owner petitioners have no protection against these outrageous charges other than to petition the courts for relief, for they are effectively disenfranchised within the Town. There are approximately 63,000 residential voters within the Town of Babylon, and only approximately 4,000 business owners and operators, most of whom live outside the Town, and cannot vote. Spreading solid waste costs out fairly within the Town would require the Town Board to raise residential property taxes, which it refuses, for political reasons, to do.[8]

The Second Circuit has usurped the power of Congress to determine when discrimination against interstate commerce will be allowed by refusing to apply controlling precedents of this Court. No remedy lies within the Town for these Petitioners; only this Court can restore their constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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tion in exchange for a five year guarantee that 120,000 tons of garbage each year would be delivered to the operator, who would be permitted to charge $81.00 per ton as a tipping fee. Thus the operator was guaranteed $9.27 million each year for five years (for a total of $48.6 million), in exchange for financing a $1.4 million facility! The decision of this Court is silent as to whether any of the money went back to the Town.

[8] Petitioners U.S.A. Recycling and Friendly Carting, who are prevented from collecting and processing the solid waste as they were free to do before creation of the District, resides outside of the town, and thus also are disenfranchised.